STATEMENT OF THE CASE

GI Forum[1] appeals the decision of the District Court following a remand by this Court to reconsider its ruling in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Although Latinos in Texas have always comprised a significant portion of the state's population, until the 1970's their ability to register and vote was limited by a series of discriminatory official practices including the poll tax, white primaries and an annual voter registration requirement. In recent years, Latino voter participation has steadily increased. However, Latino voter registration and turnout still lags behind that of Anglos in Texas and voting continues to be highly racially polarized. As a result, the Latino-majority congressional districts of South and West Texas are the only districts in which Latinos comprise the majority of the electorate.

In *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002), a three-judge district court created Congressional District 23 ("District 23") as a remedial majority-minority district pursuant to the Voting Rights Act and for the purpose of providing Latino voters the opportunity to elect their candidate of choice. Just as it appeared that District 23's Latino voters would elect their candidate of choice, the Texas Legislature reconfigured the district and dramatically reduced the Latino voter population. The State's express rationale for removing Latinos from the district

[1] The GI Forum of Texas is a membership organization founded in 1948 by Mexican American veterans. The organization worked to end school segregation, employment discrimination and denial of veteran's benefits to Mexican Americans. Today, the GI Forum is dedicated to protecting the civil rights of Latinos in the United States.

was to protect the incumbency of the Anglo-preferred candidate. The resulting district boundary changes that spread across South and West Texas diluted the voting strength of Latinos in the state.

On remand, the District Court declined to reconsider whether the 2003 Texas congressional redistricting scheme discriminates against Latino voters, relying instead on its prior ruling that an asserted partisan motivation shields the State from liability even when the State intentionally dilutes Latino voting strength. The District Court further declined to reconsider its prior ruling that the State's plan dilutes Latino voting strength in violation of section 2 of the Voting Rights Act.

This is a straightforward case of vote dilution intended to thwart the political strength of minority voters as they were on the brink of electing their candidate of choice.

Eliminating electoral opportunity for minority voters cannot be within the tolerable limits of partisan gerrymandering. Congress undertook to regulate this aspect of fairness in congressional elections when it enacted section 2 of the Voting Rights Act. In *Vieth*, this Court recognized that intentional race discrimination is justiciable and inappropriate in seeking partisan advantage. This Court thus has a special obligation to enforce section 2 since it reflects a national political decision about fairness in districting. *See Vieth*, 541 U.S. at 267; *Davis v. Bandemer*, 478 U.S. 109 (1986).

A. Factual Background

Following the 2000 Census, the task of drawing a congressional district map in Texas fell to the federal court in *Balderas v. Texas*. After trial, the three-judge District Court issued its congressional plan on November 14, 2001.

Balderas v. Texas, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002). Texas used the *Balderas* court plan (Plan 1151C) for its 2002 congressional elections. *See* Jackson Appellants' J.S. App. at 218a (map of Plan 1151C).

The *Balderas* court plan created six districts in South and West Texas with a majority of Latino registered voters. These six districts spanned the lower portion of the state, creating an inverted triangle with corners on the Gulf Coast at Corpus Christi, the southernmost tip of the state at Brownsville and far West Texas at El Paso. Declining to create a seventh Latino-majority district in South and West Texas, the *Balderas* court explained that it could only create Latino-majority districts that are required by the Voting Rights Act. The creation of a seventh district, it stated, was up to the Legislature. All six Latino-majority districts in the *Balderas* court plan offered Latino voters the opportunity to elect their candidate of choice.

In 2003, Governor Perry called three separate special sessions to take up and alter the court-drawn map. The Texas Legislature enacted its new statewide redistricting plan in October 2003.

1. The Legislative Redistricting Plan (1374C)

In the new redistricting plan (Plan 1374C) ("State Plan"), the State decided to create seven Latino voting-age majority districts in South and West Texas. In order to create seven such congressional districts, each with a population of 651,619, the State significantly expanded the geographic territory used to create the Latino districts – from 44 to 58 counties. *See* J.S. App. at 239 (Map of Plan 1374C).

Similar to the *Balderas* court plan, the State Plan maintains one congressional district located along the Gulf

Coast, one district anchored in El Paso, one district within San Antonio and one district covering much of West Texas. Unlike the *Balderas* court plan, however, the State Plan creates an additional district based on the U.S. Mexico border. This district reaches from Hidalgo County to the City of Austin.

The Latino-majority districts in the State Plan are less compact than those of the *Balderas* court-drawn plan. *See* JA at 27-29.[2]

Six of the seven Latino-majority districts in the State plan contain a majority of Latino voting age citizens (Districts 15, 16, 20, 25, 27 and 28). Election analyses conducted by the State's expert showed that the six districts with a majority of Latino voting age citizens offer Latinos the opportunity to elect their candidate of choice. *See id.* at 179-183.

In District 23, the State Plan reduced the Spanish-surnamed voter registration from 55% to only 44% even though the *Balderas* court created District 23 as a Latino opportunity district.[3] Because of its high rate of racially polarized voting, District 23 in the State Plan does not offer Latinos the opportunity to elect their candidate of choice. The State expert's analysis showed that Latinos

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[2] Plaintiffs here refer to the mathematical measures of compactness known as "perimeter to area" and "smallest circle." *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 554-55, n.203 (1993). The Texas Legislative Council, the state agency that assists legislators with redistricting, reported the standard quantitative compactness scores for the seven districts in the State Plan.

[3] District 23 in the State Plan contains 45.8% Latino voting age citizens, compared to 57.5% in the *Balderas* court plan. *See* J.S. App. at 144.

were unable to elect their candidate of choice in every general election that he studied. *See id.* at 181.

Thus, although the State Plan took in a great deal more territory to the north than that used by the *Balderas* court plan for Latino districts, the State Plan divides the area in such a way that it creates only six Latino opportunity districts[4] in this region.

2. The State Dismantled District 23 as an Opportunity District for Latinos.

District 23 extends along the U.S.-Mexico border from the City of Laredo to the outskirts of El Paso. The district reaches to the north to include portions of San Antonio and then moves across the Trans-Pecos to encompass the Latino communities of West Texas. Much of the land in District 23 is rural, including ranches and farmland. The towns and cities of District 23 contain a substantial, if not majority, Latino population.

Since its creation as a Latino-majority district, District 23 has always included the City of Laredo and all of Webb County. A vibrant U.S.-Mexico border city of 176,000, Laredo is best known today as our nation's principal port of entry to Mexico and the second-fastest growing city in the United States.[5] The population of Laredo is 94% Latino.

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[4] As used in this Brief, an "opportunity district" is one in which Latino voters have the opportunity to nominate and elect their candidate of choice.

[5] In 2000, the Laredo port of entry accounted for roughly 41.2% of the total value in overland trade between the U.S. and Mexico, making it one of the busiest ports of entry in the hemisphere.

a. Congressman Bonilla is not the Latino candidate of choice in District 23.

District 23 elected a Latino-preferred candidate, Congressman Albert Bustamante, from 1984 to 1990. The Texas Legislature reconfigured District 23 in 1991 and Congressman Bustamante lost to the Anglo-preferred candidate, Henry Bonilla, in the 1992 election.

Congressman Henry Bonilla represented District 23 during the 1990's as the number of Spanish-surnamed registered voters in the district rose from 46% to 53%. During this time, Mr. Bonilla was successfully reelected with strong Anglo support and limited Latino support. Mr. Bonilla was never the candidate of choice of Latino voters; the willingness of Latino voters to vote for Mr. Bonilla allowed him to remain in office as his district grew into one with a majority of Spanish-surnamed registered voters.[6]

b. In 2002, District 23 was a Latino opportunity district.

In 2001, the *Balderas* court added Latino population to District 23. In the *Balderas* court plan, District 23 featured 57.5% Hispanic citizen voting age population and 55.3% Spanish-surnamed registered voters. The parties agree that District 23, as created by the *Balderas* court, was an opportunity district for Latino voters in 2002. Dr. Keith Gaddie, testifying for the State, found that District 23 in the *Balderas* court plan "performed" for Latino voters in 2002, *i.e.*, elected the Latino candidate of choice in 13 of 15 statewide general elections. Dr. Gaddie further

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[6] Tr., Dec. 18, 2003, 1:00 p.m., at 55 (Bob Davis).

testified that a district that elects the Latino-preferred candidate in 13 out of 15 elections offers Latinos the opportunity to elect their candidate of choice.[7]

Dr. Richard Engstrom, testifying for the GI Forum Appellants, and Dr. Alan Lichtman, testifying for Democratic Congressional incumbents, found similarly that District 23 in the court drawn plan offered Latino voters the opportunity to elect their candidate of choice.[8] Mr. Bob Davis, the State's chief mapmaker in the Senate, described District 23 as an opportunity district for Latino voters.[9]

c. Increasing racially polarized voting in District 23 threatened Mr. Bonilla's incumbency

Over the course of the 1990's, Latino voters gave less and less of their support to Congressman Bonilla. J.S. App. 145. Increased racially polarized voting in Congressman Bonilla's elections, and rising levels of Latino voter registration, threatened his reelection. *See* JA at 134, 138. In 2002, Congressman Bonilla received the lowest level of support from Latino voters that he had ever received – a mere 8%. *See* J.S. App. at 128. Although he was a ten-year

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[7] Jackson Pls. Ex. 140 (Gaddie deposition at 128-29). Dr. Gaddie also noted that a different configuration of District 23 during the 1990's, which contained far lower levels of Latino voter registration and voting age population, had not been effective to elect the Latino-preferred candidate. *Id.* (Gaddie deposition at 132).

[8] *See* Joint Appendix ("JA") at 56 (Lichtman expert report); GI Forum Pls. Ex. 86 (Engstrom expert report).

[9] Tr., Dec. 17, 2003, 3:00 p.m. at 115-16 (Bob Davis) ("Once District 23 was taken down, its Hispanic numbers were reduced . . . If you were going to take down a performing Hispanic District, you had to place it somewhere – replace it somewhere in the State with another performing Hispanic District that met those standards.").

incumbent, Mr. Bonilla almost lost his seat, garnering a slim 51.5% of the overall vote.

Mr. Bonilla's crisis in 2002 was precipitated by the shift of Latino voters away from him, not a shift in the partisan composition of his district. In fact, the Republican performance of District 23 was enhanced by the *Balderas* district court when compared to District 23 in the previous (1990's) plan.[10] In spite of the fact that District 23 had become more Republican after the three-judge court redrew it in 2001, Mr. Bonilla's margin of victory had diminished to less than 2 percentage points in 2002.[11]

d. The State removed Latino population from District 23 to safeguard Mr. Bonilla's incumbency.

In 2003, in order to preserve Congressman Bonilla's incumbency, the State dismantled District 23 as a Latino opportunity district. The State's changes to District 23 reduced the Spanish-surnamed registered voters from 55.3% to 44%, and rendered it unable to elect the Latino candidate of choice.

State mapmakers and legislators openly stated that their reason to reconfigure District 23 was to ensure the

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[10] GI Forum Pls. Ex. 3, 4 (Texas Legislative Council RED-M200 reports for Plans 1151 and 1000). In fact, the precincts comprising District 23 demonstrated a 56.4% Republican index in statewide elections in 2004, according to the Texas Legislative Council.

[11] By 2002, Mr. Bonilla received less support among Latino voters in District 23 than other Republican candidates for office. For example, one of the State's mapmakers acknowledged that the Anglo Republican candidate for Texas Comptroller in 2002, Carol Keaton Rylander, received twice as much support from Latino voters in District 23 as Mr. Bonilla. Tr., Dec. 18, 2003, 8:30 a.m., at 56 (Bob Davis).

reelection of Mr. Bonilla. Representative Phil King, chief sponsor of plans in the Texas House, testified that the State altered District 23 to make sure Mr. Bonilla was re-elected. *See id.* at 229. The Texas Senate's chief redistricter, Bob Davis, similarly testified that the goal in changing District 23 was to ensure the reelection of Mr. Bonilla.[12]

The State's goal however, necessarily meant that Latino voting strength had to be reduced. The State's expert testified that the bolstering of Mr. Bonilla's re-election chances and the reduction of Latino population in District 23 "happen together, [and] one is a consequent of the other." *Id.* at 222. The District Court concluded that the State's drastic reconfiguration of District 23 was intended to ensure the reelection of Mr. Bonilla, with the ultimate goal of building the State's Republican delegation to 22. *See id.* at 90-91. However, the reconfiguration of District 23, and concomitant creation of District 25, did not increase the number of Republican seats in the State, but it did bolster the reelection chances of Mr. Bonilla.

e. The State ensured a nominal Latino-majority in District 23 to create the impression of Latino support for Mr. Bonilla.

As admitted by legislative mapmakers, Texas dismantled District 23 with the second goal of ensuring that Mr. Bonilla would be reelected in a nominally Latino-majority district, albeit one with only a 50.9% Latino voting age majority. The State's expert witness testified that, despite

[12] Tr., Dec. 18, 2003, 8:30 a.m., at 114 (Bob Davis).

his warnings to the Legislature that they were creating a District 23 that would not perform for Latino voters, "every version of District 23 I've seen has maintained it as a majority VAP [voting age population] district." *Id.* at 220, 223.

The State accomplished this reduction in Latino voting strength by slicing through Webb County and the City of Laredo, both of which have greater than 90% Latino population. Explaining their changes to District 23, State mapmakers admitted that one of their goals was to ensure that District 23 contained a nominal majority of Latinos. *See id.* at 229.

The State's mapmakers articulated a profoundly racial motive: reduce the Latino population of Congressional District 23 so that it could not elect the Latino-preferred candidate, but ensure that the district was nominally Latino so that Mr. Bonilla could still claim to be elected from a Latino-majority district. Representative Phil King put it this way: "Well, we tried the keep it above 50% Hispanic VAP, and we tried to make it a District that [had] some more Republicans in it so that Henry Bonilla could have an easier time with reelection because we didn't want to lose him." *Id.*

Similarly, for the Senate, Bob Davis testified that while he understood that "Mr. Bonilla did not get a majority of the Hispanic vote," his goal nevertheless was to bolster Mr. Bonilla's incumbency while at the same time ensuring the district maintained a Latino-majority.[13]

Texas mapmakers intended to maintain the impression of a Latino majority in the district so that Henry

[13] Tr., Dec. 18, 2003, 1:00 p.m., at 42, 47-49 (Bob Davis).

Bonilla would raise the profile of the Republican party among Latinos, despite the fact that Latino voters in the district did not support him. Bob Davis testified, "[O]ne of the principal objectives in this redistricting process, was to enhance District 23 and Congressman Bonilla's stature. And, of course, you know, I have some personal feelings with respect to that, is that I believe that Congressman Bonilla's participation in the election in these principally Hispanic counties in South Texas has a beneficial impact long term."[14] Representative King further testified that the Legislature revised District 23 as they did because "frankly, we're trying, as a party, to recruit Hispanic members . . ."[15]

Thus, Texas mapmakers created the pretense of a Latino-majority district – one which would continue to elect the Anglo-preferred candidate but which would also serve as a symbol of Latino support for their political party.[16]

3. The State Crafted Seven Latino-Majority Districts in South and West Texas but Only Provided Political Opportunity in six.

The State's decision to create seven congressional districts in an area featuring a 58% Latino citizen voting age majority brought with it the potential to create seven congressional districts that would offer Latino voters the

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[14] Tr., Dec. 18, 2003, 8:30 a.m., at 114 (Bob Davis).

[15] Tr., Dec. 18, 2003, 1:00 p.m., at 165 (Rep. Phil King).

[16] After it purposefully maintained a bare and ineffective 50.9% Latino voting age majority in District 23, Texas claimed in its request for preclearance under section 5 of the Voting Rights Act that District 23 was a Latino opportunity district.

opportunity to elect the Latino candidate of choice. Instead, the State diminished District 23 to the point of ineffectiveness and then rearranged the remaining congressional boundaries to insert District 25. The net political result was six Latino opportunity districts located in a larger, expanded area of the state that should have supported seven such districts.

GI Forum Plan 1385C

At trial, GI Forum offered an alternative redistricting plan (1385C) to demonstrate that all seven Latino-majority districts created by the State in South and West Texas could offer Latinos the opportunity to elect their candidate of choice.

The GI Forum plan followed a method similar to the *Balderas* court plan and the State Plan for placing districts in South and West Texas. However, the GI Forum plan creates a seventh Latino district that is relatively small; located along the Interstate 35 corridor, the district connected the urban Latino neighborhoods of Austin and San Antonio. *See* J.S. App. at 241 (map of Plan 1385C).

The Texas Legislative Council reported that the GI Forum Latino districts met the compactness standards established by the State Plan.[17] All seven of the GI Forum Latino-majority districts also contained a majority of

[17] The "perimeter to area" scores of the State Plan districts ranged as high as 11.6 and the "smallest circle" scores ranged as high as 8.5. The perimeter to area scores of all the GI Forum Latino-majority districts were lower (more compact) than the State Plan's Latino-majority District 15. Similarly, the smallest circle scores for all the GI Forum districts were lower than that of the State Plan's District 25. GI Forum Trial Ex. 48 and 49 (RED M-315 for Plan 1374C and RED M-315 for Plan 1385C).

Latino voting age citizens. *See id.* at 143 n.136. Election analyses showed that the seven districts offered Latinos the opportunity to elect their candidate of choice.[18]

B. Procedural History

GI Forum filed its challenge to the 2003 congressional redistricting plan in the United States District Court for the Southern District of Texas on October 14, 2003. That case, *GI Forum v. Texas*, No. CV-03-124 (S.D. Tex. 2003), was consolidated with other redistricting challenges in the U.S. District Court for the Eastern District of Texas on October 23, 2003. *Session v. Perry*, No. 2:03-CV-354 (E.D. Tex. 2003). Trial went forward on December 11, 2003.

After trial, the District Court upheld the State's congressional redistricting plan in an opinion dated January 6, 2004 and issued its final judgment on January 15, 2004. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex.); J.S. App. at 217. On appeal, this Court vacated that ruling and remanded the case for reconsideration in light of *Vieth v. Jubelirer*. *See Jackson v. Perry*, 125 S.Ct. 351 (2004). The District Court issued its opinion on June 9, 2005 once again denying Plaintiffs' claims. *See Henderson v. Perry*, No. 2:03-CV-354 (E.D. Tex.); J.S. App. at 1.

1. The District Court's Opinion

The District Court spent the bulk of its opinion considering the claims of unconstitutional partisan gerrymandering raised by Democratic litigants. Focusing on the partisan motivations in the challenged plan, the District Court did not separately consider whether race played an impermissible

[18] GI Forum Pls. Ex. 86 (Engstrom expert report).

role in the reconfiguration of Latino-majority districts in South and West Texas.

Congressional District 23

The District Court found that Latino population was removed from District 23 in order to ensure the reelection of incumbent Henry Bonilla, who was not the preferred candidate of Latino voters: "The evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8 percent of the Latino vote." J.S. App. at 145, 128. In order to "shore up" District 23 for the incumbent, the District Court found that the State removed 99,766 people, who were more than 90% Hispanic, from the district and added 101,260 largely Anglo residents of the Texas Hill Country. *Id.* at 128. The District Court concluded that the State accomplished this removal of Latino population by slicing through the middle of the City of Laredo and Webb County. *See id.*

In its opinion, the District Court noted District 23's Latino composition and discussed the changes made by the Texas Legislature in terms of their effect on Latino voters. The District Court observed that the State's changes to District 23 reduced the Hispanic citizen voting age population 57.5% to 46% and reduced the percentage of Spanish-surnamed registered voters from 55.3% to 44%. *See id.* at 128-129. The District Court concluded that: "Congressional District 23 is, unquestionably, not a Latino opportunity district under Plan 1374C. The map drawers divided Webb County, which is 94 percent Latino." *Id.* at 144.

Nevertheless, the District Court accepted the partisan justification offered by the State for eliminating District

23 as a Latino opportunity district but maintaining it as nominally Latino-majority:

> The change to Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular, with the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population – although clearly not a majority of citizen voting age population and certainly not an effective voting majority.

Id. at 145-146.

Declaring in its opinion that, "a high percentage of Blacks and Latinos are Democrats," the District Court systematically confounded the notions of race and partisan affiliation:

> The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection. The evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8 percent of the Latino vote.

Id. at 91, 128.

The District Court, struggling to reconcile the State's identified racial and partisan goals, and to provide appropriate weight to the racialized element of even the partisan goal standing alone, ended up effectively deferring to the State, concluding that "this plan was a political product from start to finish." *Id.* at 96. The District Court expressed at length its discomfort with this solution, explicitly noting the lack of adequate guidance on reconciling dual racial and non-racial motivations. *See id.* at 96-97.

Expressing reluctance to "inject the federal courts into a political game for which they are ill-suited," the District Court also refrained from making an appropriate inquiry into the State's racial intent. *Id.* at 96-97.

Latino Vote Dilution Throughout Texas

The District Court rejected GI Forum Appellants' claim that Defendants violated section 2 of the Voting Rights Act by diluting Latino voting strength.

Applying the test set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the District Court evaluated the claim by GI Forum that all seven Latino-majority districts in South and West Texas should have been configured to offer the opportunity to elect the Latino candidate of choice.

The District Court found that the GI Forum Plan 1385C contained seven districts with a majority of citizen voting age Latinos, thus satisfying the numerosity requirement for the first *Gingles* precondition in the Fifth Circuit. J.S. App. at 133 ("The GI Forum Plaintiffs present a demonstration district, [sic] Plan 1385C, that shows an additional Latino citizen voting age majority district in South and West Texas.")

The District Court further found that Texas is characterized by racially polarized voting, satisfying the second and third *Gingles* preconditions. *Id.* at 136 ("This court recognizes that Plaintiffs have established racially polarized voting and a political, social, and economic legacy of past discrimination.").

The District Court ultimately concluded that GI Forum's proposed districts did not satisfy the first *Gingles* precondition because, although the districts met or bettered the compactness measures established by the

State plan, "Plan 1385C proposes districts that are more unusually shaped" than the challenged Plan 1374C. *Id.* at 74.

Although conceding that it was bound by this Court's rulings in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*) and *Johnson v. DeGrandy*, 512 U.S. 997 (1994), the District Court concluded that the State could permissibly offset the vote dilution caused by the loss of District 23 by creating District 25. *See* J.S. App. at 44-46. Limiting the holding of *Shaw II* to the creation of non-compact districts, the District Court held that the State's creation of District 25, which was intended to cure the retrogression caused by eliminating District 23, also offsets any vote dilution, otherwise actionable under section 2. *See id.* at 147-150.

2. Judge Ward Issued a Strong Dissent in Support of GI Forum's Claims.

Judge Ward, who was also a member of the 2001 *Balderas* panel that drew the previous map, wrote separately in dissent from the majority's January 2004 opinion. Judge Ward explained that District 23 was created by the *Balderas* three-judge panel in 2001 to provide Latino voters the opportunity to elect their candidate of choice:

> [Under] Plan 1151C, District 23 was a protected Latino opportunity district ... The *Balderas* court implicitly recognized that District 23 under Plan 1151C was a protected minority opportunity district when it maintained only six Latino-majority citizen voting age districts. A review of the statistical package for Plan 1000C reveals that District 23 was one of those six districts. All

> six (and only those six) had a Spanish Surname Voter Registration in excess of 50 percent.

Id. at 190 (Ward, J., dissenting in part).[19]

Judge Ward found that by reconfiguring District 23, the State had "made the conscious choice to dismantle a minority opportunity district to thwart the growing Latino dissatisfaction with an incumbent Congressman. Just when it became apparent that District 23 was becoming more effective for the class it was intended to protect, the State intentionally altered it." *Id.* at 207.

Noting the increasing dissatisfaction of Latino voters with Congressman Bonilla, Judge Ward wrote:

> The State's solution to this political problem was brutal, yet simple: destroy the opportunity district. The state did so by cracking a cohesive Hispanic community out of Webb County and taking in Anglos from the Texas Hill Country to build a district in which the Hispanic community will not be able to influence the outcome of the election.

Id. at 191.

Judge Ward also rejected the State's attempt to offset the loss of District 23 as an effective Latino district through the crafting of a new District 25:

> Although I recognize that "States retain broad discretion in drawing districts to comply with the mandate of § 2," I do not read the Court's cases to mean that the "effects" test of § 2, if satisfied, may be defended against by pointing to a political

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[19] In its opinion, the *Balderas* court referred to the six Latino-majority districts it created as "protected." *Balderas*, No. 6:01-CV-158, Slip Op. at 5, 9 and 12.

> agenda in the affected portion of the jurisdiction and compensation, over the long haul, to other members of the injured group residing elsewhere in the jurisdiction.

Id. at 194 (internal citations omitted).

Positing that increasing Latino population in another Texas congressional district could threaten an incumbent, Judge Ward explained, "To use *DeGrandy* to permit the State at that stage to dismantle [such a district] and create a new district somewhere else has a tendency to perpetuate the legacy of discrimination, not to thwart it." *Id.* at 208.

Finally, Judge Ward wrote that the GI Forum Appellants had proved their vote dilution claims under section 2. *Id.* at 197-208. Noting that the State had included 14 new counties in its configuration of South and West Texas congressional districts, and reviewing the GI Forum Appellants' suggested rearrangement of district boundaries in this same territory, Judge Ward wrote that the "evidence is undisputed that, under Plan 1385C, sponsored by the GI Forum Plaintiffs, Latino voters constitute the majority of citizen voting age population in seven congressional districts in South and Central Texas." *Id.* at 208. Having met the standard set out in the first *Gingles* precondition, Judge Ward further found that the GI Forum Appellants' districts were effective, concluding that, "[v]iewed in light of these election returns, as opposed to simply looking at the CVAP content or any other single statistic, all of these districts perform, in terms of winning elections, at least as well as their counterparts in Plan 1374C." *Id.* at 199.

Judge Ward further concluded that the proposed seven Latino opportunity districts were compact and met

the *DeGrandy* proportionality test and that the 2001 decision in *Balderas* did not compel the outcome of the GI Forum's vote dilution claim because *Balderas* dealt neither with Plan 1374C nor the newly available census data on citizen voting age population. *See id.* at 202-210.

3. The District Court's Opinion on Remand.

On remand, the District Court relied upon its earlier conclusion that the configuration of Latino-majority districts in South and West Texas contained no race discrimination because it was motivated by partisanship. The District Court declined to consider whether, in its pursuit of a partisan goal, the State violated the rights of Latino voters. Instead, the District Court dismissed such claims as "beyond the scope of the mandate."[20]

The District Court did not discuss whether or how this Court's decision in *Vieth* might affect its prior ruling with respect to Latino vote dilution. Specifically, the District Court did not explore language in *Vieth* that distinguished between partisan gerrymandering and drawing district lines to disadvantage voters on the basis of race and this

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[20] The District Court disposed of the claims presented by GI Forum in a brief paragraph:

> The GI Forum . . . return to their claims that the Texas plan impermissibly burdens minority voters in violation of the Voting Rights Acts [sic] and the Equal Protection Clause of the Fourteenth Amendment. Each would tie these claims to partisan gerrymandering. The contention is that these violations occurred in the effort to gain partisan advantage, however else the effort may be flawed. We examined and rejected all of the claims in detail in our previous opinion. As these claims are beyond the scope of the mandate we are not persuaded that we should revisit them.

J.S. App. at 42.

Court's reiteration that redistricting because of race is subject to the strictest scrutiny. In addition, although *Vieth* makes clear that Congress has a preeminent role in establishing fairness standards for federal elections, the District Court did not explore on remand whether the standards for racial fairness set out in the Voting Rights Act might serve as a limit on the pursuit of partisan advantage in this case. *See Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J. concurring) (discussing the importance of not diminishing the existing limits on improper redistricting practices).

SUMMARY OF THE ARGUMENT

1. The District Court erred when it failed to find that the State's redistricting plan violates the Voting Rights Act and the Constitution by diluting Latino voting strength. Where a state intentionally acts to minimize or cancel out the voting strength of minorities for any reason, a districting plan cannot be squared with protections afforded by the Constitution and the Voting Rights Act. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Well-established equal protection principles require that a redistricting plan that purposefully dilutes the voting strength of a racial group is subject to strict scrutiny review. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995).

2. The State's redistricting plan violates the results-based test of section 2 of the Voting Rights Act, which prohibits an election practice that, under the totality of the circumstances, impairs the ability of minority voters to elect their candidate of choice on an equal basis with other voters. *See Voinovich v. Quilter*, 507 U.S. 146 (1993); *Gingles*, 478 U.S. at 47. Within the context of a redistricting plan,

minority voting strength may be illegally diluted by fragmenting minority voter population across districts. *See Growe v. Emison*, 507 U.S. 25 (1993). When a state creates seven Latino-majority minority districts, but reduces the Latino voting population in one district so that it cannot elect the Latino-preferred candidate, it only provides political opportunity to Latino voters in six districts. If all seven Latino-majority districts can be configured to provide the opportunity to elect the Latino-preferred candidate, and under the totality of circumstances, Latinos enjoy neither an equal ability to participate in the electoral process nor proportional political strength, the failure to create seven Latino opportunity districts violates section 2.

3. Federal courts play a special role in enforcing the Congressional mandate of racial equality in redistricting. The Voting Rights Act of 1965, enacted to fulfill the promise of the Fourteenth and Fifteenth Amendments, protects minority voters from intentional dilution of their vote as well as redistricting plans that have the effect of diluting minority voting strength. The Voting Rights Act and the Constitution play a particularly important role when minority voters have achieved levels of political participation that allow them to elect their candidate of choice and states respond by changing the system to protect the election of Anglo-preferred candidates. Aware of the long history of official discrimination against minority voters, including Mexican American citizens in Texas, Congress passed the Voting Rights Act to regulate redistricting and ensure fair and equal participation by minority voters.

4. The record below establishes that Congressional District 23 was intentionally reconfigured by the Texas Legislature to weaken the voting strength of the Latino

population so that it could not elect the candidate of its choice. District 23 was experiencing increasing racially polarized voting in its congressional elections and the Latino voters in the district had dramatically reduced their support for the Anglo-preferred candidate. In order to preserve the incumbency of the Anglo-preferred candidate, the State cut more than 100,000 Latinos from the district and replaced them with voters from the largely Anglo communities to the north. Furthermore, the State created seven Latino-majority districts in a Latino-majority region of South and West Texas but distributed the Latino population in such a way that only six districts provide Latinos the opportunity to elect their candidate of choice. Because all seven Latino-majority districts in South and West Texas can be configured to provide Latino voters the opportunity to elect their preferred candidate, and Texas is characterized by racially polarized voting, disproportionately low Latino political representation and the legacy of official discrimination against Latinos, the Legislative redistricting plan violates section 2.

ARGUMENT

I. STATES MAY NOT PURPOSEFULLY THWART GROWING MINORITY POLITICAL STRENGTH IN REDISTRICTING.

"Congress enacted Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race.'" *Voinovich*, 507 U.S. at 152.

In its enactment of section 5 of the Act, Congress recognized that existing remedies were inadequate to

address discrimination in voting and sought to prevent states from enacting new discriminatory election practices. *See Allen v. State Board of Elections*, 393 U.S. 544, 548 (1969) ("Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress therefore enacted § 5 . . . ").[21]

Congress reauthorized the Voting Rights Act in 1970 in part to address the attempts by states to limit the political strength of a growing minority electorate. Furthermore, this Court, in a series of rulings under section 5 of the Act, recognized that states and their subjurisdictions used a variety of mechanisms such as changes to at-large from district voting, strategic annexations and polling place relocations, as well as changes to candidate qualifications and methods of voting, to thwart burgeoning minority political strength. *See Allen*, 393 U.S. at 548; *Fairley v. Patterson*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 379, 391 n.10 (1971) ("There is surely no doubt today that the right to vote can be curtailed as effectively by an impermissible demarcation of an elected official's constituency as by the destruction of ballots or the refusal to permit access to the voting booth.") (citation omitted).[22]

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[21] *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966) ("Congress knew that some [States] had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.").

[22] Examples of official exclusion of Mexican Americans from voting in Texas include White Primary associations such as that in Dimmit County, which was formed expressly to exclude Mexican American voters. In 1927, after the Texas White Primary Law was struck down by

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In *White v. Regester*, 412 U.S. 755 (1973), this Court specifically noted the struggle of Mexican American voters in Texas to register and participate in elections, as well as to overcome Jim Crow laws that segregated public accommodations and created a system of segregated "Mexican schools." *Id.* at 767-69.[23] *See also Hernandez v. Texas*, 347 U.S. 475 (1954) (successful challenge to the race-based exclusion of Mexican Americans from juries). Following the Court's decision in *White v. Regester*, Congress in 1975 extended the Voting Rights Act to certain language minorities.

When Texas subsequently brought suit to evade coverage of section 5, this Court noted:

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this court in *Nixon v. Herndon*, 273 U.S. 536 (1926), the Texas Legislature passed a law authorizing political parties to set their own voter qualifications and that same year the Democratic party enacted a rule that only whites could vote in the primary. This law was struck down in *Nixon v. Condon*, 286 U.S. 73 (1932). That same year, the Texas Democratic party passed a new resolution limiting party membership to white citizens. That rule was struck down in *Smith v. Allwright*, 321 U.S. 649 (1944). Texas maintained its poll tax until it was invalidated by this Court in *Harper v. Virginia Board of Elections*, 382 U.S. 951 (1966). In response, the first Senate bill of the first called session of the 1966 Texas legislature required voters to register annually. The annual registration requirement was not removed until 1971. *See* "White Primary" in the Handbook of Texas Online, found at www.tsha.utexas.edu/handbook/online/.

[23] "[T]he Bexar community, along with other Mexican-Americans in Texas, had long 'suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others . . . [A] cultural incompatability . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *White v. Regester*, 412 U.S at 767-69 (quoting *Graves v. Barnes*, 343 F. Supp. 704 (1972) (internal quotations omitted)).

> Congress concluded after extensive hearings that there was "overwhelming evidence" showing the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities. Concern was particularly expressed over the plight of Mexican American citizens in Texas, a State that had not been covered by the 1965 Act.

Briscoe v. Bell, 432 U.S. 404, 405-406 (1977) (citing S. Rep. No. 94-295, pp. 25-28 (1975); H. R. Rep. No. 94-196, pp. 17-20 (1975)) (internal quotations omitted).[24]

II. DISMANTLING A LATINO OPPORTUNITY DISTRICT FOR THE SOLE PURPOSE OF ELECTING THE ANGLO-PREFERRED CANDIDATE VIOLATES THE CONSTITUTION AND THE VOTING RIGHTS ACT.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also McLaughlin v.*

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[24] Cases discussing official discrimination against Mexican Americans in voting and other aspects of civic life, within the geographic area of South and West Texas, include *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004); *League of United Latin Am. Citizens v. N. E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1085 (W.D. Tex. 1995); *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994) *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996); *Sierra v. El Paso Indep. Sch. Dist.*, 591 F. Supp. 802, 807-09 (W.D. Tex. 1984); *Seamon v. Upham*, 536 F. Supp. 931, 987 (E.D. Tex. 1982) (Justice, C.J., dissenting). *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 556 n.16 (5th Cir. 1980); *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970); *Inhabitants of Del Rio Independent School District v. Jesus Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App., 1930), *appeal dismissed, w.o.j., and cert. denied*, 284 U.S. 580, 52 S. Ct. 28, 76 L. Ed. 503 (1931).

Florida, 379 U.S. 184, 192 (1964). Just as in every other context of government action, equal protection principles preclude intentional discrimination in the redistricting process. *See Miller v. Johnson*, 515 U.S. at 911; *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Thus, where a state intentionally acts to minimize or cancel out the voting strength of a racial group for any reason, a districting plan cannot be squared with protections afforded by the Constitution. *See United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Gomillion*, 364 U.S. at 346.[24]

The test for intentional vote dilution under section 2 of the Voting Rights Act is similar to the test for unconstitutional vote dilution. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980), *superceded in part by statute* by 42 U.S.C. § 1973. Section 2, however, also prohibits election systems that have the result of diluting minority voting strength.[25]

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[24] In *Gomillion*, the Court held that the realignment of municipal boundaries that "fenc[es] Negro voters out of town so as to deprive them of their pre-existing municipal vote" could not conform with the Constitution. *Gomillion*, 364 U.S. at 340. The Constitution, stated the *Gomillion* Court, imposes a "specific limitation upon State power" and is violated "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment." *Id.* at 343, 346.

[25] In 1982, Congress amended the Voting Rights Act to reach discriminatory conduct that might otherwise evade liability under the more stringent intent standard established in *City of Mobile v. Bolden*. The amendment added a "results-based" test to analyze vote dilution claims. S. Rep. No. 97-417, at 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 218 ("S. Rep."). "The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in

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A. There is Ample Evidence of the State's Intent to Discriminate Against Latinos in the Redrawing Of District 23.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977).[27] This Court has further recognized that a plaintiff need not prove that a challenged action rested solely on racially discriminatory purposes. *See id.* at 265. As explained by the Court:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory

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question, results in minorities being denied equal access to the political process." *Id.* at 27.

[27] The "important starting point" for assessing discriminatory intent is whether the impact of the official action "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (citing *Davis*, 426 U.S. at 242). Other considerations include: the "historical background of the [State's] decision"; the "specific sequence of events leading up to the challenged decision"; "departures from the normal procedural sequence"; and the "legislative or administrative history, especially ... [any] contemporary statements by members of the decision-making body." *Id.* at 266-68.

> purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id. at 265-266.

Lower courts have consistently followed the prohibition on mixed motive race discrimination in redistricting even when a state articulates a non-racial motivation for its actions. *See Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (stating that "under the peculiar circumstances of the case, the requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for Senator Joyce is virtually coterminous with a purpose to practice racial discrimination"); *see also Ketchum v. Byrne*, Nos. 83-2044; 83-2065; 83-2126, 1984 U.S. App. LEXIS 19572, at *28 (7th Cir., August 14, 1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.").

Here, the District Court had sufficient evidence of the State's intent to minimize the voting power of the Latino population in District 23. In 2002, with 57.5% Hispanic citizen voting age population and 55.3% Spanish-surnamed registered voters, District 23 was a Latino opportunity district. In the face of increasing racial polarization in his elections, and the lowest level of Latino voter support he had ever received, Congressman Henry Bonilla barely held his seat in the 2002 election. *See* J.S. App. at 128, 145. In response, the State intentionally carved out of District 23 a large portion of the Latino population in order to ensure that Latinos could not remove Bonilla from office in the next election. *See id.* The State's own expert testified at trial that ensuring the reelection of Congressman

Bonilla and the reduction of Latino population in District 23 were knowingly and inextricably entwined. *See id.* at 222. The same expert went on to explain that the Legislative map-drawers ignored his repeated warnings that they were creating a District that would not perform for Latino voters. *See id.* at 219-220.

B. The District Court Erred in not Applying Strict Scrutiny to the State's Reconfiguration of District 23.

A redistricting plan which invidiously minimizes the voting strength of a racial group is not excepted from standard equal protection precepts. *See Rogers*, 458 U.S. at 617 (holding that redistricting plan violates the Fourteenth Amendment if "'conceived or operated as purposeful device to further racial discrimination' by minimizing, canceling out or diluting the voting strength of racial elements in the voting population.") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). Moreover, strict scrutiny applies to a redistricting plan that purposefully dilutes the voting strength of a racial group. *See Miller*, 515 U.S. at 915 (confirming that strict scrutiny applies to charges of intentional minority vote dilution); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (Strict scrutiny applies to intentional racial discrimination because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").[28]

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[28] Strict scrutiny, it has been observed, is "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)

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The State's response to the Latino population's growing dissatisfaction with the incumbent in District 23 was to purposefully strip them of electoral power. As explained by Judge Ward in his dissent, "When [the State] enacted Plan 1374C, the State altered the racial composition of District 23 not to *increase* the likelihood that the Latino community therein would elect a candidate of its choice, but to ensure it would have no practical influence on the congressional election." J.S. App. at 191 (Ward, J., dissenting in part) (emphasis in original). Thus, the District Court plainly erred in not analyzing the GI Forum plaintiffs' intentional discrimination claim under well-established Equal Protection Clause principles.

C. Protecting a Political Incumbent is not a Compelling State Interest Which Would Legitimize the State's Intentional Discrimination.

Because strict scrutiny applies here, the District Court should have required the State to show that it had a compelling state interest in intentionally diluting the Latino vote in District 23. *See Miller*, 515 U.S. at 904 ("Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest"). The State's defense, essentially, was that the Legislature was carrying out the wishes of a political party to safeguard the reelection of one of its partisans. Indeed, the District Court recognized that the State's purpose in restructuring District 23 was to

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("[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

protect the incumbent in that district whose loss of support from the Latino community had threatened his reelection. *See* J.S. App. at 128.

Incumbency protection, however, is simply not a permissible motive when diluting minority votes is chosen as the means to protect an incumbent. *See Garza*, 918 F.2d at 771 (concluding that although line drawers acted primarily to protect incumbents, their knowledge that they were preventing the emergence of a Latino-majority district together with other aspects of the process were sufficient to require a finding of intentional and unlawful racial discrimination). Furthermore, intentional discrimination on the basis of race need not be linked to animus to be unconstitutional. *See, e.g., Adarand*, 515 U.S. at 228-229 (1995) (proclaiming that "'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification") (citations omitted); *see also Garza*, 918 F.2d at 778. Indeed, particularly in this day and age, intentional discrimination often comes justified as the servant of some other purportedly neutral or indifferent goal.[29] Thus, whether the State acted with racial animus in enacting 1374C is not

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[29] In *Garza*, Judge Kozinski aptly illustrated how intentional discrimination can intersect with legitimate motives:

> Assume you are an [A]nglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza, 918 F.2d at 778 n.1 (Kozinski, J., concurring in relevant part).

of consequence, as the record clearly establishes that District 23 was intentionally crafted to weaken the voting strength of the Latino population so that it could not elect the candidate of its choice.

The dismantling of a minority opportunity district, with the goal that it no longer provide the opportunity to elect the minority-preferred candidate is not only "rare," as the term is used by Justice Scalia in *Vieth*, but may very well be unique in redistricting history to date. *Vieth*, 541 U.S. at 286. Given the clear-cut facts of the case, the District Court should have found not only that race played an impermissible role in the Texas redistricting plan, but that the use of race was not justified by any compelling state interest. The startling facts surrounding the use of race in dismantling District 23, combined with the State's unsupportable justification of "partisanship," more than meet the standard for unconstitutional race discrimination and also any standard for partisan gerrymandering sought by Justice Kennedy in *Vieth*.

D. The Election of a Latino Candidate in District 23 is Irrelevant Given That he is not the Minority's Representative of Choice.

Despite the fact that he is Latino, there is no dispute that Henry Bonilla, the incumbent in District 23 is not the Latino candidate of choice. *See* J.S. App. at 144-145. As this Court has previously explained, Mr. Bonilla's ethnicity is not relevant to the question whether District 23 offers Latino voters the opportunity to elect their candidate of choice, because the race of a candidate alone does not prove his status as a minority-preferred candidate:

> [B]oth the language of § 2 and a functional understanding of the phenomenon of vote dilution

> mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives *of their choice*." (Emphasis added.) . . . Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.

Gingles, 478 U.S. at 67-68.

Nor is Mr. Bonilla's race relevant to the question whether District 23 today is a coalitional or influence district. In 2002, with a majority of Latino registered voters, District 23 was a Latino opportunity district; in that election, Mr. Bonilla almost lost his seat, winning a slim 51.5% of the vote. The subsequent reduction in Latino population in District 23 ensured that Mr. Bonilla, the Anglo-preferred candidate, would continue to be elected to Congress without having to worry about or respond to the drastic decline in support from Latino voters. Although it now contains a substantial minority of Latino voters, District 23 is not a district in which "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *DeGrandy*, 512 U.S. at 1020.

When a district is intentionally drawn to ensure that a candidate will continue to win despite the fact that he is demonstrably not the minority community's candidate of choice, that district not only denies the minority the ability to elect, but also denies it any ability to influence the elected representative once he has been chosen.

III. THE STATE PLAN DILUTES LATINO VOTING STRENGTH IN TEXAS.

A. The Violation of Section 2 and the Equal Protection Clause Committed in District 23 is not Cured by the Creation of a new Majority Latino District Elsewhere in the State.

In the case at hand, the State asserted, and the District Court erroneously accepted, that the State could remedy, under section 2 as well as section 5, the loss of District 23 as a majority-minority district by creating District 25.

The State chose to expand the territory in which it drew Latino-majority districts by adding 14 whole or partial counties. The population of this newly-expanded territory required the creation of seven congressional districts and overall contained a Latino citizen voting age majority of 58%. After including greater numbers of Latino voters, however, State mapmakers artfully crafted only six districts in which Latinos enjoyed the opportunity to elect their candidate of choice. This dilutive construction of districts limited the voting strength of Latinos in the state by packing and fracturing them across South and West Texas.

This Court's rulings in *Shaw II* and *DeGrandy* make clear that states may not trade off the voting rights of people in one region for those in another region:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else

> in the State. . . . To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.

Shaw II, 517 U.S. at 917. *See also DeGrandy*, 512 U.S. at 1019 (it is "highly suspect" to hide behind proportionality if "in any given voting jurisdiction, the rights of some minority voters under Section 2 [are] traded off against the rights of other members of the same minority class . . . ") (parenthetical omitted); *Rural W. Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 844 (6th Cir. 2000) (relying on *DeGrandy* and *Shaw II* to refrain from analyzing minority opportunity to elect in other parts of the state "because to do so would require us to trade the § 2 rights of individual African-Americans in rural west Tennessee against those of African American groups elsewhere in the State"); *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge panel) (rejecting claim that racially-motivated district was compelled by section 2 where district was not located in geographic area of vote dilution).

GI Forum recognizes that any time redistricting occurs, it is likely that some voters who were originally assigned to a district in which they were able to elect a candidate of their choice will find themselves assigned to a district in which that is no longer true. This may be particularly true when the voter is a member of a group whose share of the population is growing and thus lives in a district that will be overpopulated, thus requiring the removal of some voters.

However, in the case at hand, the realignment of district boundaries to exclude Latinos from District 23 was

not required by the Constitution's mandate of equal population. Texas undertook its mid-decade redistricting for the purposes of maximizing partisan advantage and protecting incumbents of one political party, not to cure any constitutional or legal deficiencies in the plan. Texas also did not redistrict to increase the plan's respect for political subdivisions, respect for communities of interest or to increase compactness of the districts. Moreover, the decision to expand the redistricting territory and the number of districts located in the majority Latino South and West Texas eliminated any justification for assigning Latino voters to districts where their votes would be diluted.

B. The District Court Erroneously Required GI Forum's Demonstrative *Gingles* Districts to be More Compact and Provide Greater Electoral Opportunity Than Their Counterparts in the State's Plan.

Section 2 of the Voting Rights Act prohibits any practice that "'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153 (quoting *Gingles*, 478 U.S. at 47). When an election system has been shown to dilute minority voting strength, section 2 "[opens] the door to drawing majority-minority districts to put minority voters on an equal footing with others." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 350 (2000).

Gingles provides one framework for determining whether a districting plan impairs the ability of Latinos to elect representatives of their choice in violation of section 2. In that case, the Supreme Court established a two-step

inquiry for analysis of vote dilution claims. *See Gingles*, 478 U.S. at 50-51. First, the minority group must be able to demonstrate: (1) "that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "that it is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, . . . usually to defeat the minority's preferred candidate." *Id.*

The second step of the inquiry requires the court "to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters." *Id.* at 79 (citations and internal quotation marks omitted). The Senate Judiciary Committee, in a report accompanying the 1982 amendments to the Voting Rights Act, provided a non-exclusive list of factors that a court should consider in determining whether the challenged practice impermissibly impairs the ability of the minority group to elect their preferred representatives.[30]

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[30] These factors include, but are not limited to: (1) the extent of any history of official discrimination in the state or political subdivision affecting the right of a member of a minority group to register, vote, or participate in the democratic process; (2) the extent to which voting in government elections is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group (for example, unusually large election districts, majority vote requirements and prohibitions against bullet voting); (4) exclusion of minorities from a candidate slating process; (5) the extent to which minority group members in the state or political subdivision bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minorities have been elected to

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In order to demonstrate that a simple rearrangement of the boundaries of the State's seven Latino districts yields a more rational and compact seven Latino opportunity districts, GI Forum proposed Plan 1385C. As noted by Judge Ward of this panel, the "evidence is undisputed that, under Plan 1385C, sponsored by the GI Forum Plaintiffs, Latino voters constitute the majority of citizen voting age population in seven congressional districts in South and Central Texas." J.S. App. at 198 (Ward, J., dissenting in part); *see also id.* at 133. Election analysis performed by Dr. Richard Engstrom, and relied upon by the District Court, demonstrates that all seven opportunity districts proposed by the GI Forum offer the opportunity to elect the Latino-preferred candidate.

The parties agreed that South and West Texas are characterized by strong racially polarized voting. Dr. Keith Gaddie, expert witness for Defendants, examined an extensive set of regression analyses which were submitted to the Court as Exhibits 22 (Regression Analyses for Plan 1151C) and 32 (Regression Analyses for Plan 1374C). Dr. Gaddie's regressions show a consistent pattern of racially polarized voting between Anglos and Latinos statewide as well as in South and West Texas. In addition, various plaintiffs' experts, including Dr. Richard Engstrom, Dr. Henry Flores and Dr. Alan Lichtman examined voting behavior and concluded that voting is racially polarized between Latinos and Anglos in Texas and in the area of

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public office in the jurisdiction. Additional factors are: "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs" of the minority group and "whether the policy underlying the ... use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. at 29; *see also Gingles*, 478 U.S. at 48 n.15.

South and West Texas. GI Forum Exh. 71 and 107; Jackson Ex. 1.

The District Court ruled against GI Forum on three issues: compactness; opportunity to elect; and proportionality. In each instance, the District Court identified the correct quantitative test but then refused to apply that test to the GI Forum's demonstrative plan.

1. The GI Forum's Demonstrative Districts Were Compact Because They Exceeded the Compactness Standards of the Challenged Plan.

The District Court erroneously required GI Forum's demonstrative districts not just to meet but exceed in every instance the compactness of the State's districts in the region and then further satisfy an ill-defined "eyeball" test applied subjectively by the District Court.

The *Gingles* test is applied in redistricting cases where a plan is challenged for failure to draw a sufficient number of majority-minority districts. *Growe*, 507 U.S. at 39-41. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* precondition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *DeGrandy*, 512 U.S. at 1008.

Fifth Circuit precedent required the District Court to apply the compactness test of the first *Gingles* precondition only to evaluate whether an additional Latino-majority district was achievable. *See Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995) (en banc) ("[T]he question is not whether the plaintiff residents' proposed district was oddly shaped, but whether the proposal

demonstrated that a geographically compact district could be drawn."); *Clark v. Calhoun County, Miss.*, 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible").

Remedial majority-minority districts need not be more compact than alternative proposals offered by plaintiffs in constitutional challenges:

> "A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'"

Bush v. Vera, 517 U.S. 952, 977 (1996).

The compactness scores for the districts in the GI Forum plan met and bettered the compactness standards in the State's plan.

The District Court thus erred by concluding, without reference to any objective measures of compactness, that the GI Forum's demonstration districts would not satisfy the first *Gingles* precondition because they were not sufficiently compact. *See* J.S. App. at 74. For example, the District Court criticized GI Forum's demonstrative Congressional Districts 15 and 25 as "unusually shaped" despite the fact that they are *more* compact than the State's challenged Districts 15 and 25. *Id.* at 134-135 n.125. The District Court also compared G.I. Forum's demonstrative Congressional District 28, which spans the relatively short distance between San Antonio and Austin, unfavorably with the State's Congressional District 28, which stretches

more than three times the distance to connect Zapata County with Hays County. *See id.*[33]

2. The GI Forum's Demonstrative Districts Provided the Opportunity to Elect the Latino-preferred Candidate Because Latino-preferred Candidates Prevailed in Most or all Elections.

The District court erred in concluding that, under the totality of the circumstances, the GI Forum demonstrative districts did not afford Latino voters the opportunity to elect their candidate of choice.

As an initial matter, GI Forum maintains that the District Court was not required to examine the election performance of the GI Forum demonstrative districts after the court determined that the districts met the 50% citizen voting age threshold under the first *Gingles* precondition. *See id.* at 143.

Even assuming that the District Court was correct to require GI Forum's Latino-majority districts to satisfy an additional test of political opportunity, the GI Forum districts met that test. The District Court chose election performance, as demonstrated by statewide election results, as its test of electoral opportunity for minority

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[33] None of the District Court's factual findings addressed whether the Latino community of South and West Texas, which fits neatly into the 58 county area identified by the District Court, is sufficiently numerous and compact to comprise the majority of seven districts. *See Vera*, 517 U.S. at 997 (1996) (Kennedy, J., concurring) ("The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.").

voters, and relied on the analyses provided by the expert political scientists in the litigation. *See id.* at 150.[31]

Prior to examining the electoral performance of Latino-majority districts in the GI Forum plan, the District Court evaluated whether the the State Plan offered Latino voters the opportunity to elect their candidate of choice. *See id.* Because the six Latino-majority districts in the State Plan elected the Latino candidate of choice in most or all racially-contested elections, the trial court concluded that the districts offered the opportunity to elect the Latino-preferred candidate and thus there had been no reduction of Latino political strength when compared to the *Balderas* court plan. *See id.* at 150-160. Even when it concluded that Latino voters in two districts did not prevail in all elections, the trial court found that the districts were effective and afforded the opportunity to elect the Latino-preferred candidate.[32]

The District Court properly recognized that the opportunity to elect means that minority voters are able to nominate and elect their candidate of choice in most

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[31] This analysis, known as "bivariate ecological regression," is the accepted method of determining the existence of racially polarized voting and the minority candidate of choice. *See Thornburg* at 50 n.20 (citing the work of GI Forum's expert political scientist, Dr. Richard Engstrom). This Court has also referenced the work of Dr. Engstrom in *Karcher v. Daggett*, 462 U.S. 725, 751 n.8 (1983), *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas J., concurring) and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 350-351 (2000).

[32] The District Court concluded for Plan 1374C: "[I]n Congressional Districts 25 and 28, Latino voters will likely control every primary and general election outcome; in Congressional Districts 15 and 17, Latino voters will likely control every primary outcome and almost every general election outcome; and in Congressional District 23, Latino voters will likely control every primary outcome but not the general elections." J.S. App. at 160.

elections. *See id.* at 161 ("Section 2 guarantees minority voters an effective opportunity to exercise electoral control, not overwhelming electoral majorities or guarantees of success."). This Court held similarly in *Johnson v. DeGrandy*, "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *DeGrandy*, 512 U.S. at 1014 n.11. The District Court correctly rejected the testimony of those who argued that a district's effectiveness turns on super-majority demographics.[33]

After establishing a test of electoral performance to evaluate minority electoral opportunity in the State's plan, the District Court failed to apply its test to the GI Forum Latino-majority districts. Although the District Court relied upon and reprinted in its opinion the GI Forum's statistical table showing six Latino opportunity districts in the State Plan the District Court excised the portion of that same table showing seven Latino opportunity districts in the GI Forum plan.[34] Similarly, the District Court relied upon the testimony of GI Forum's expert witness to conclude that the State Plan contained six Latino opportunity districts while ignoring those portions of his analysis showing that the GI Forum plan contained seven

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[33] For example, in evaluating the effectiveness of the State Plan's Latino-majority districts, the District Court rejected the non-statistical testimony of one witness who stated that "you become more comfortable with opportunity districts once you break into those 60%-plus ranges." J.S. App. at 141 n.136.

[34] Compare partial table at J.S. App. at 152 n.151, which cites to GI Forum Post Trial Brief at 15, with full table at GI Forum Post Trial Brief at 15.

Latino opportunity districts. *See* J.S. App. at 151 n.150, 154, 158 n.171, 159 n.175.

The District Court's own test of political opportunity showed that the GI Forum District 28 nominated and elected the Latino candidate of choice in eight out of eight elections. This 100% rate of electoral success is the same as that of State Plan District 28, which was found by the District Court to be a Latino opportunity district. *See id.* at 151-152 (GI Forum Ex. 89). Nevertheless, the District Court summarily concluded that GI Forum District 28 was not effective "because . . . a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district." *Id.* at 140-141 (emphasis in original). Similarly, the GI Forum proposed District 23 gave the majority of its votes to every statewide Latino-preferred candidate in 2002 – the identical election outcome as District 23 in the *Balderas* court plan.

The District Court's rejection of its own test for the GI Forum Latino-majority districts, and its unsupported conclusion that the GI Forum Latino-majority districts were not opportunity districts, contradicted the unanimous testimony of the expert witnesses in the litigation and was clear error.

C. The District Court Misapplied *DeGrandy* in Concluding That the First *Gingles* Precondition Operates as a cap on the Proportionality That can be Achieved by Minority Voters in a Redistricting Plan.

The District Court applied the traditional proportionality test articulated in *Johnson v. DeGrandy*, 512 U.S. at 997, to the State's redistricting plan and concluded that "Plaintiffs are correct in their calculation that six districts

in which Latinos hold a majority of citizen voting age population, out of thirty-two districts that comprise Texas, do not equate to arithmetic proportionality between the number of Latino-majority-minority districts and the Latinos' percentage of the citizen voting age population in the State." *Id.* at 139-140. Nevertheless, after applying the correct proportionality standard under *DeGrandy* and finding that Latinos do not enjoy proportional political strength, the District Court applied a new and incorrect standard to conclude that Latinos in Texas do enjoy proportional political strength.

The District Court held that, in the proportionality analysis, the overall number of districts in the redistricting plan should be limited to a smaller number of minority opportunity districts, improperly tying the question of proportionality back into the first *Gingles* precondition: "*DeGrandy* requires an examination of whether the totality of circumstances includes rough proportionality between the number of *effective* majority minority districts that can be drawn meeting the *Gingles* factors and the minority-members' share of the relevant population." *Id.* at 140 (emphasis in original). *But see DeGrandy*, 512 U.S. at 1013 n.11 ("'Proportionality' as the term is used here links the number of majority minority voting districts [in the geographic area at issue] to minority-members' share of the relevant population.").

The District Court concluded that because, under the first *Gingles* precondition, no more than six Latino citizen voting age majority districts could be created in Texas, Latinos enjoyed proportionality when they comprised the majority of six districts, regardless of the number of districts in the statewide redistricting plan or the proportion of Latinos in the state. Thus, the number six functions

as the upper limit of permissible political opportunity for Latinos in Texas, regardless of their share of the State's population.

This Court has never imposed the cap on political opportunity espoused by the District Court and has never suggested that the first *Gingles* precondition plays a role in evaluating whether minority voters possess, under the totality of circumstances, an equal opportunity to participate in the political process. *See id.* at 1011 ("[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts"). The first *Gingles* precondition addresses whether minority voters are geographically concentrated in such a way that the proposed remedy will address their vote dilution; proportionality addresses a very different issue – whether minorities enjoy political opportunity regardless of geographic dispersion. To make the latter dependent on the former is circular logic, collapses the broader inquiry of totality into the specific test of the first *Gingles* precondition and defeats the purpose of looking beyond the *Gingles* preconditions to make an overall assessment of opportunity to participate in the political system.

According to the U.S. Census, in 2004 Latinos comprised approximately 24.5% of the Texas citizen voting age population.[35] In a redistricting plan containing 32 congressional

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[35] Data from the 2004 American Community Survey of the U.S. Census Bureau lists the citizen voting age population of Texas as 13,707,293. The Latino citizen voting age population is 3,365,604. *See* U.S. Census Bureau, American Community Survey, http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=ACS_2004_EST_G00_&-CONTEXT=dt&-mt_name=ACS_2004_EST_G2000_B05003&-tree_id=304&-redoLog=false&-all_geo_types=N&-geo_id=04000US48&-

(Continued on following page)

districts, Latino citizen voting age proportionality would be met at 7.83 districts. The District Court should have concluded that eight opportunity districts would provide proportional political representation to Latinos in Texas and that the State plan falls well short of this number.[36]

CONCLUSION

Redistricting that violates minority voting rights in the name of partisanship tramples on the ideal of "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964). A rule that prohibits diluting minority voting strength in the name of partisanship presents one "judicially discernable and manageable" test for constitutional redistricting. *Bandemer*, 478 U.S. at 123. "Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution." *Vieth*, 541 U.S. at 311 (Kennedy, J. concurring). Accordingly, the Court should reverse the judgment below

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tree_id=304&-redoLog=false&-all_geo_types=N&-geo_id=04000US48&-search_results=01000US&-format=&-_lang=en. *See also* http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=ACS_2004_EST_G00_&-CONTEXT=dt&-mt_name=ACS_2004_EST_G2000_B05003I&-tree_id=304&-redoLog=false&-all_geo_types=N&-geo_id=04000US48&-search_results=01000US&-format=&-_lang=en.

[36] *See Stabler v. County of Thurston, Nebraska*, 129 F.3d 1015, 1022 (8th Cir. 1997) (holding that when the population ratios do not match the fractions of the number of districts, the proportionality inquiry for Native American voters should not be limited to the "maximum number of majority minority districts possible without exceeding proportionality" because "[t]here is no reason why the Native Americans in this case should continue to bear the burden of under-representation under the current scheme while the white majority enjoys over-representation.").

and remand the case to the three-judge District Court for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AM. CITIZENS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

TRAVIS COUNTY, TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

EDDIE JACKSON, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

GI FORUM OF TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF OF APPELLEES TINA BENKISER, Chairman, Republican Party of Texas, AND JOHN DeNOYELLES

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PARTIES TO THE PROCEEDING

Appellants in No. 05-276 list Appellee Tina Benkiser and the other parties to the four consolidated cases filed in 2003: *Session v. Perry* (No. 2:03-CV-354) (lead case); *Jackson v. State of Texas* (No. 2:03-CV-356) (consolidated by order of Oct. 23, 2003); *GI Forum of Texas v. State of Texas* (No. 2:03-CV-367) (order of Oct. 27, 2003); and *LULAC v. State of Texas* (No. 2:03-CV-380) (order of Nov. 6, 2003).

The district court also consolidated with *Session v. Perry* three cases filed in 2001, including *Balderas v. State of Texas* (No. 6:01-CV-158) (order of Oct. 23, 2003). Parties to the *Balderas* case include Appellee John DeNoyelles; Emily Amps; John Archer; Rolando Arriola; Associated Republicans of Texas; Atascosa County, Texas; Congressman Joe Barton; Bell County, Texas; Congressman Ken Bentsen; Congressman Kevin Brady; Bonnie Breazeale; Boyce T. Breedlove; David Brown; Tony Campos; Congressman John Culberson; Congressman Tom Delay; Jesse Diaz; Gina Dixon; Pauline Dixon; Bennie Escobar; Denise Escobar; Ed Gonzales; Grayson County, Texas; Vivian Harris; Stephan Leroy Honore; Howard County, Texas; Guy C. Jackson III; Congressman Sam Johnson; Johnson County, Texas; Louis Laster; Ledbetter Neighborhood Association; Dorothy M. Lee; LULAC 4496 of Dallas; Henry Martinez; Ralph McCloud; Mexican-American Legislative Caucus, Texas House of Representatives; Terry Meza; Roy Millner; Michael Moon; Morris Overstreet; Eugene Pack; Dan Pedroza; Raphael Quintanella; George Rios; Margaret P. Rodriguez; Frank D. Sandoval Jr.; Hargie Faye Savoy; Joy Smith; Roy Stanley; Phil Sudan; Texas Farm Bureau Mutual Insurance Company; The Texas Legislative Black Caucus; Alex Vidales Sr.; Dianna Villasana; Charles E. Vinn Sr.; Wichita County, Texas; Molly Woods; Williamson County, Texas; David O. Zambrano; the Attorney General of Texas; the Comptroller of Public Accounts of Texas; and the Texas Land Commissioner.

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SUMMARY OF ARGUMENT

The redistricting plan entered by the three-judge court in 2001 indisputably perpetuated an egregious Democratic gerrymander from the 1990s, thus virtually insuring that the "party with a minority of the popular vote within the State in all likelihood [would retain] a majority of the seats" in the Texas congressional delegation for the second consecutive decade. *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting). Although the Pennsylvania Democrats in *Vieth* attacked this situation as a constitutionally impermissible denial of majority rule, *id.* at 271-73 (plurality op.), Texas Democrats now suggest that this situation is constitutionally and statutorily required.[1]

Specifically, they contend that the Texas Legislature's effort to ameliorate this "entrenchment" of a "party that enjoys only minority support" is facially illegitimate because it reflects a purely political desire to "augment the influence" of the majority Republican party by achieving representation roughly commensurate with the level of the party's support in Texas. *Id.* at 360 (Breyer, J., dissenting); Brief of Jackson Appellants ("App. Br.") at 18 n.17. But, while the Constitution does not require redistricting plans to provide roughly proportional representation or majority rule, it most certainly does not prohibit such efforts at political equality, regardless of when this curative effort occurs. Appellants' contention that such ameliorative redistricting is facially impermissible after the first election of the decade makes a mockery of the plain text of the Elections Clause, perverts the limited remedial role of the judiciary in redistricting, and

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[1] Ms. Benkiser, Chairman of the Republican Party of Texas, believes that she should not have been sued as a defendant in this case because the Party was not involved in or responsible for the challenged redistricting, but she has been named as a defendant and appellee in this case and, consequently, files this responsive brief with Mr. DeNoyelles, who had intervened in the district court in 2001 to assert his interests as a voter.

does not rationally serve any norm of equality enshrined in the First or Fourteenth Amendments because it condemns plans that provide "fair and effective representation" under any conception of that term.

Worse still, Appellants contend that the Voting Rights Act's command of equal minority opportunity prevents alteration of one of the worst examples of the brazen 1990s Democratic gerrymander—District 24—solely because the white Democratic representative who drew the district for himself, like virtually all Democrats, enjoys the support of black voters, who comprise 21.4% of the district's voting age population. The notion that Section 2 requires the creation or retention of districts where black voters constitute just over one-fifth of the electorate because they are part of a successful bi-racial coalition which elects a Democrat is irreconcilable with any rational understanding of *minority* vote *dilution*, the language and equal opportunity mandate of the Voting Rights Act, this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the bedrock principle that the federal judiciary cannot and should not advance the partisan interests of a particular party merely because most minorities belong to it.

I. THE POLITICAL GERRYMANDERING CLAIMS LACK MERIT

A. Appellants' Proposed Test Is Invalid

Appellants do not and cannot contend that the Texas Legislature's plan would have constituted an unconstitutional gerrymander under any standard articulated by any Justice, if it had been enacted in 2001. *See infra* § I.D. Yet they advance the astounding and quite perverse notion that an otherwise perfectly valid redistricting plan becomes invalid simply because the Texas Legislature acted after the first election of the decade. App. Br. at 30. They contend that the timing of the redistricting renders wholly impermissible a legislature's desire to "augment the influence" of one party *relative* to the pre-existing plan, even

if a legislature's plan *improves* "partisan balance," because an effort to cure a "current map [that] is 'unfair' or 'skewed'" is impermissible "state action aimed solely at altering the partisan outcome of elections." *Id.* at 18 n.17, 27-28. To the contrary, if the Equal Protection and First Amendment rights of voters in a political party are not violated by a plan when used for the first election of the decade, then the same plan cannot possibly violate those rights when used in later elections. That is because adherence to these rights can be adjudged based only on what a plan *does*, not *when* it is used.

1. *First*, there is no rational basis for having the constitutional right of voters to "fair and effective representation," *Vieth*, 541 U.S. at 307-09 (Kennedy, J., concurring), turn on whether the Texas Legislature avoided "one-person, one-vote" liability by enacting a plan before the first election in the decade or, instead, performed its constitutionally prescribed responsibility under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, *after* a plan with population equality had been entered. That is why no Justice has ever suggested that a plan's compliance with equal population mandates is even *relevant* in assessing whether it is an unconstitutional gerrymander. Even those Justices who believe that gerrymandering claims should be assessed principally in terms of whether district lines reflect solely a political purpose acknowledge that a plan's adherence to the "one-person, one-vote rule" should *not* be "one of the traditional criteria that may serve to defeat a claim that a district has been gerrymandered on a [political] basis." *Vieth*, 541 U.S. at 339 n.33 (Stevens, J., dissenting). Indeed, a later-enacted "gerrymander" is in place for *less* time, so would, if truly "unfair," be preferable to one that affects all five of the decade's elections.

More fundamentally, preventing a legislature from redistricting unless it has some "*constitutional obligation*" (App. Br. at 26 (emphasis added)) to cure legal *deficiencies* in a court-drawn plan turns the judicial and legislative roles